United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1928

United States Court of Appeals

For the Second Circuit.

INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellee,

v.

AIRFREIGHT TRANSPORTATION CORPORATION OF NEW JERSEY, NEW DEAL DELIVERY SERVICE, Inc., and EXPRESS/S.D.Z., Inc.,
Defendants,

AIRFREIGHT TRANSPORTATION CORPORATION OF NEW JERSEY,
Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York.

APPELLANT'S BRIEF.

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Case No. 74-1928

Defendants

AIRFREIGHT TRANSPORTATION CORPORATION OF NEW JERSEY,

Defendant-Appellant.

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APPELLANT'S BRIEF

This is an appeal from a judgment and order made on the 17th day of May, 1974, by HON. JACOB MISHLER, Chief Judge of the United States District Court held in and for the Eastern District of New York, granting a permanent injunction perpetually enjoining the appellant, its agents, employees, representatives, and all persons, firms, companies, and corporations, and their respective officers, agents, servants, employees, and representatives, in active

concert or participation with them, from in any manner or by any device, directly or indirectly, transporting or holding out to transport property in interstate commerce by motor vehicle for compensation, on public highways, as a for-hire, common or contract carrier, by motor vehicle, unless and until such time, if at all, as there is in force with respect to said appellant a certificate of public convenience and necessity, or a permit or other form of authority issued by the Interstate Commerce Commission authorizing such particular transportation and operations.

In May of 1970, appellant purchased a certificate of public convenience and necessity for the sum of $55,000.00, authorizing it to transport property in interstate commerce by motor vehicle for compensation and to act as a common carrier for hire.

During the period from October 21, 1971 to May 9, 1972, appellant made certain trips, thirty in number, all for the same consignee (Clairol, Inc.) either to its terminal in Stamford, Conn. or Boston, Mass., pursuant to a concurrence with defendants NEW DEAL DELIVERY SERVICE, INC. or EXPRESS/S.D.Z., INC.

The certificate of public convenience and necessity

of the appellant did not include either Stamford or Boston as one of its authorized terminals but the certificate of NEW DEAL DELIVERY SERVICE, INC. or EXPRESS/S.D.Z., INC. did and appellant arranged with these licensed carriers to pay them ten percent of the revenue for each shipment and did so under the mistaken belief that it was acting in full compliance with the plaintiff's regulations.

In May of 1972, appellant was informed by plaintiff's representative that its transactions were illegal. It immediately desisted and ceased these transactions.

Thereafter, these thirty violations were the subject of a penalty assessed by the plaintiff against the appellant at the rate of $100.00 per violation, making a total sum of $3,000.00 which appellant paid.

The learned Judge below was very candid in his statement that he did not believe that he had any discretion in granting or denying an injunction. An excerpt of the colloquy between the Court and counsel is set forth in the Appendix annexed hereto.

POINT I

THERE IS NO POSSIBILITY OF A RECURRENCE OF THE ACTS COMPLAINED OF

So far as a recurrence is concerned, the learned Justice below dismissed the action against the defendant NEW DEAL DELIVERY SERVICE, INC. holding that there was absolutely no possibility of a recurrence so far as that defendant was concerned. Furthermore, it was conceded by the plaintiff-appellee that the other defendant EXPRESS/S.D.Z., INC. was defunct and out of business so that there was no possibility of a recurrence with regard to that defendant. No other acts of concurrence by appellant were complained of or claimed.

It is therefore respectfully submitted that there was absolutely no proof by the plaintiff-appellee of the possibility of a recurrence of these acts which were the subject matter of the plaintiff's complaint and for which an injunction was sought.

It was on the identical thirty acts of violation for which the full penalty sought by the plaintiff was paid that this action for an injunction was based and the same acts of violation were annexed by the plaintiff to its complaint as an exhibit.

The appellant in its answer pleaded that it had paid the full penalty for the identical acts which were part of the complaint. (The learned Judge below stated

that that was neither relevant or material to the application for an injunction.)

POINT II

IT WAS ERROR TO GRANT A PERMANENT INJUNCTION AS FAR REACHING AND AS EXTENSIVE AS HAS BEEN GRANTED

The Interstate Commerce Commission has the right to investigate, punish, grant or withhold rights involving the very right to carry on and continue in business, which is a power equivalent to the power of life and death over the motor carrier companies such as appellant.

It does not need an order or judgment of injunction to reach out and assess damages against those motor carriers and has broad investigative and discretionary powers in this regard.

The remedy of injunction has always been held an extraordinary remedy and one not lightly granted. To obtain an injunction, it must be conclusively established that there is a real need for injunctive relief and that absent the granting of injunctive relief, permanent harm can be done.

It is incomprehensible that plaintiff should invoke the jurisdiction of the Federal Court and single out

appellant for this drastic remedy, particularly when the wrongful acts complained of have already been the subject of a severe and substantial penalty.

It is respectfully submitted that the learned Judge below was in error that he stated that he had no discretion under these circumstances in the granting or denying of a permanent injunction.

Some of the authorities to the contrary are as follows:

Tri-State Motor Transit Corp. v. International Transport Inc., 843 Fed. Supp. 588; Interstate Commerce Commission v. Pilot Freight Carriers, Inc., 189 Fed. Supp. 373; Interstate Commerce Commission v. Travelers Motor Freight Inc., 195 Fed. Supp. 267; Bechik Products v. Flexible Products, 225 Fed. Supp. 603; Clifton Park Manor v. Mason, 137 Fed. Supp. 324; Paramount Pictures Corp. v. Holden, 166 Fed. Supp. 684; Stewart Sampling Corp. v. Westchester Products Co., 119 Fed. Supp. 92; U.S. v. Tasty Baking Co., 55 Fed. Supp. 490.

In Interstate Commerce Commission v. Pilot Freight Carriers, Inc., (supra), the Court held in part as follows:

"The Court should be particularly cautious and circumspect in granting an injunction, if a violation in addition to being a contempt of court would also constitute a criminal offense, since by this course the defendant might be deprived of a jury trial if he transgresses the law."

CONCLUSION

The judgment of injunction should be reversed and the complaint dismissed.

Respectfully submitted,

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